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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 KIM GASKILL and KAREN GASKILL,
12 husband and wife, and the marital
13 community consisting thereof,

14 Plaintiffs,

15 v.

16 TRAVELERS INSURANCE
17 COMPANY, a foreign insurance
18 company; SENTRY INSURANCE, a
19 foreign insurance company; and JOHN
20 DOE INSURANCE, an unknown insurer,

21 Defendants.

CASE NO. C11-5847 RJB

ORDER DENYING MOTION TO
AMEND COMPLAINT

19 This matter comes before the Court on Plaintiffs' motion to amend complaint. Dkt. 109.
20 The Court has considered the pleadings in support and in opposition to the motion and the record
21 herein.

22 **INTRODUCTION AND BACKGROUND**

23 This insurance coverage dispute involves a lawsuit filed by Plaintiffs on September 2,
24 2011, asserting underinsured motorist coverage against two insurers, Sentry Insurance A Mutual

1 Company (incorrectly identified as Sentry Insurance) and Travelers Indemnity Company
2 (incorrectly identified as Travelers Insurance Company). The original Complaint pleaded first-
3 party insurance coverage, bad faith, and other unspecified violations of law. Dkt. 1 pp. 14.

4 On March 12, 2012, this Court granted summary judgment related to Plaintiffs'
5 contractual claims against Travelers. Dkt. 87. On March 28, 2012, this Court denied
6 reconsideration of its Partial Summary Judgment Order. Dkt. 94.

7 On March 17, 2012, this Court granted summary judgment related to Plaintiffs'
8 contractual and extra-contractual claims against Sentry and Patriot General. Dkts. 107 and 108.

9 On April 24, 2012, the Court entered a Stipulation and Order dismissing all remaining
10 claims against Travelers Insurance Company (improperly named) and The Travelers Indemnity
11 Company, including but not limited to bad faith, Consumer Protection Act violations, Insurance
12 Fair Conduct Act violations and any claim for attorney fees and exemplary damages. Dkt. 113.

13 These Orders and the Stipulation dispose of all claims of Plaintiffs against these
14 Defendants. Nonetheless, contemporaneously with the filing of the stipulation, Plaintiffs filed
15 the instant motion to amend their complaint "to reflect the pleading of the specific elements of a
16 non-per se claim under the Washington CPA ." Dkt 109 pp. 2.

17 **STANDARDS FOR AMENDMENT OF PLEADINGS**

18 Federal Rule of Civil Procedure 15(a) deals with amendments to pleadings. Once a
19 responsive pleading has been filed, "a party may amend the party's pleading only by leave of
20 court or by written consent of the adverse party; and leave shall be freely given when justice so
21 requires." Fed. R. Civ. P. 15(a). "In exercising this discretion, a court must be guided by the
22 underlying purpose of Rule 15 to facilitate decision on the merits, rather than on the pleadings or
23 technicalities." *Roth v. Garcia Marquez*, 942 F.2d 617, 628 (9th Cir. 1991); *United States v.*
24 *Webb*, 655 F.2d 977, 979 (9th Cir. 1981). Further, the policy of favoring amendments to

1 pleadings should be applied with 'extreme liberality. *DCD Programs, Ltd. v. Leighton*, 833 F.2d
2 183, 186 (9th Cir. 1987). That is not to say, however, that it should be given automatically.
3 *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1837 (9th Cir. 1990). Whether justice requires
4 granting a party leave to amend is generally determined by reference to four factors: (1) undue
5 delay; (2) bad faith; (3) futility of amendment; and (4) prejudice to the opposing party. *United*
6 *States v. Pend Oreille Public Utility Dist. No. 1*, 926 F.2d 1502, 1511 (9th Cir. 1991).

7 Defendant asserts that the proposed amendment is futile. Amendment is futile if no set
8 of facts can be proved under the amendment to the pleadings that would constitute a valid and
9 sufficient claim or defense. *Sweaney v. Ada County, Idaho*, 119 F.3d 1385, 1393 (9th Cir.1997);
10 *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988).

11 Futile amendments should not be permitted. *Roth v. Garcia Marquez*, 942 F.2d 617, 628
12 (9th Cir. 1991); *DCD Programs, Ltd v. Leighton*, 833 F.2d 183, 188 (9th Cir. 1987); *Klamath-*
13 *Lake Pharmaceutical Ass'n v. Klamath Medical Service Bureau*, 701 F.2d 1276, 1293 (9th Cir.
14 1983). Futility alone, or together with delay, is a sufficient basis upon which to deny a motion
15 for leave to amend. *Roth* at 628; *Klamath-Lake* at 1293.

16 A party should be afforded an opportunity to test his claim on the merits rather than on a
17 motion to amend unless it appears beyond doubt that the proposed amended pleading would be
18 subject to dismissal. Thus, it is futile to permit amendment to a complaint to add claims subject
19 to dismissal on a motion for summary judgment. *Roth* at 629. See also *Johnson v. American*
20 *Airlines, Inc.*, 834 F.2d 721,724 (9th Cir. 1987)(Courts have discretion to deny leave to amend a
21 complaint for 'futility,' and futility includes the inevitability of a claim's defeat on summary
22 judgment.); *Gabrielson v. Montgomery Ward & Co.*, 785 F.2d 762, 766 (9th Cir. 1986)(Any
23 amendment would have been futile in that it could be defeated on a motion for summary
24 judgment.).

1 This Court has already determined that Plaintiffs cannot pursue non-per se claims under
2 the Washington Consumer Protection Act based on the Orders entered as to Patriot General and
3 Sentry. Plaintiffs' original complaint did not mention the CPA, but in their responses to Sentry's
4 summary judgment motions, they alleged they had a viable CPA claim. In its reply, Sentry
5 argued that the Plaintiffs could not maintain that claim because Sentry had not violated any
6 insurance claims-handling regulation and had not engaged in any unfair or deceptive act or
7 practice. Although this Court noted that Plaintiffs had not pleaded a CPA claim, the Court,
8 nevertheless, analyzed that claim and determined that Plaintiffs could not satisfy its elements.
9 See Dkt. 107 pp. 6. Dkt. 113 pp. 1-4.

10 Plaintiffs' proposed amendment to the complaint is futile. It is beyond any doubt that the
11 proposed amended pleading would be subject to dismissal.

12 It is further noted that approximately eight months have passed since Plaintiffs complaint
13 was filed on September 2, 2011. Numerous motions have been ruled upon and the merits of
14 Plaintiffs' claims resolved. The delay in seeking amendment, together with considerations of
15 futility, requires denial of the motion.

16 CONCLUSION

17 Therefore, it is hereby **ORDERED**:

18 Plaintiffs' Motion to Amend Complaint (Dkt. 109) is **DENIED**.

19 Dated this 8th day of May, 2012.

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22 ROBERT J. BRYAN
23 United States District Judge
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